



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
Silver Spring, Maryland 20910

JUN 14 2001

MEMORANDUM TO: Richard Schaefer  
Director  
Office of State, Federal, and Constituent Programs

FROM: Donald R. Knowles *Don Knowles*  
Director  
Office of Protected Resources

SUBJECT: ESA Section 7 Consultation on the American Lobster  
Management Plans

This transmits the National Marine Fisheries Service's (NMFS) biological opinion (Opinion) on the effects of NMFS' continued authorization of fisheries managed under the American Lobster Fishery Management Plan (FMP) on humpback, fin, sei, blue, sperm, and western North Atlantic right whales; and loggerhead, Kemp's ridley, green, leatherback, and hawksbill sea turtles, in accordance with section 7 of the Endangered Species Act of 1973, as amended (ESA).

This Opinion concludes that NMFS' prosecution of federal fisheries managed under the American Lobster FMP, as modified by the Atlantic Large Whale Take Reduction Plan, is likely to jeopardize the continued existence of the western North Atlantic right whale, but is not likely to destroy or adversely modify critical habitat designated for the right whale. The Opinion also concludes that NMFS' prosecution of fisheries under the American Lobster FMP is not likely to jeopardize the continued existence of humpback, fin, sei, blue, and sperm whales; or loggerhead, Kemp's ridley, green, leatherback, or hawksbill sea turtles.

The Opinion identifies a reasonable and prudent alternative (RPA) with multiple management components designed to avoid the likelihood that fisheries managed under these FMP will jeopardize the continued existence of the endangered right whale. Collectively, the measures in the RPA are designed to avoid the potential for gear interactions, and minimize adverse affects if gear interactions occur. Accordingly, the Opinion anticipates that NMFS' continued prosecution of fisheries consistent with implementation of this RPA will not result in any incidental taking of endangered whales, including the right whale.



The measures included in this RPA are new and, as our agency has determined in this and other Opinions, the serious injury or death of even one right whale will appreciably reduce the ability of this species to survive and recover in the wild. If a right whale is killed or seriously injured in (1) gear that is marked as being used in the American Lobster fishery, (2) gear that is identifiable as being approved for use in a fishery authorized by the American Lobster FMP, or (3) gear that cannot be identified as being associated with a specific fishery, this information shall constitute evidence that the measures outlined in the RPA are not demonstrably effective at reducing right whale injuries or deaths.

Regulations at 50 CFR § 402.16 require federal agencies to immediately request reinitiation of formal consultation if 1) the amount or extent of taking specified in the Incidental Take Statement is exceeded; 2) new information reveals effects of the action that may affect listed species or critical habitat in a way not previously considered; 3) the action is modified in a way that causes an effect to listed species that was not previously considered; or, 4) a new species is listed or critical habitat is designated that may be affected by the action. Since the Opinion does not anticipate any incidental take of endangered whales, any taking of endangered whales would require reinitiation of consultation.

Exceeding the level of anticipated taking does not, by itself, require the action agencies to stop an ongoing action during reinitiation and completion of consultation. However, our regulations specify that the federal agency must make this ultimate determination, taking into consideration the prohibitions of section 7(a)(2) and 7(d) of the ESA. Further, if after the anticipated level of incidental take has been reached, the continued action results in any additional taking of listed species, the taking may constitute a violation of the prohibitions of section 4(d) and/or 9 of the ESA. As you know, section 7(d) specifies that "after initiation of consultation required under subsection (a)(2), the federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)." Should the incidental take anticipated in this Opinion be exceeded, the Office of State,

Federal, and Constituent Programs will need to determine how to proceed.

The incidental take statement included with this Opinion anticipates that prosecution of the American Lobster fisheries will involve the incidental take of loggerhead, green, Kemp's ridley, and leatherback sea turtles (lethal or non-lethal) on an annual basis. No incidental take of hawksbill sea turtles is anticipated with this fishery. Because the Opinion anticipates take, I have included an Incidental Take Statement in the Opinion that provides the American Lobster fishery with an exemption to the take prohibitions established in section 9 of the ESA. As you know, the reasonable and prudent measures and their terms and conditions identified in the Incidental Take Statement are non-discretionary and must be implemented for the section 9 exemption to apply.

I look forward to further cooperation with you in implementing the conditions of this Opinion and in future consultations. To ensure that future intra-agency consultations on fishery management actions can be completed in a timely manner, and the best available scientific and commercial information is included in the Opinion, I request that our offices meet as soon as possible to discuss the scope of information required by our section 7 regulations for requesting initiation of formal consultation [50 CFR § 402.14(c)].

Please feel free to call upon my staff for assistance if needed.

Attachment